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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-322

FREDERICK S. BAUM, et al.,

Petitioners,

against

LEFRAK FOREST HILLS CORP., LEFRAK KEW GARDENS CORP., and FRANKLIN NATIONAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Brooklyn, N.Y. 11201
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LEFRAK FOREST HILLS CORP., LEFRAK KEW GARDENS CORP., and FRANKLIN NATIONAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners Frederick S. Baum, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New York entered in this proceeding on May 3, 1973 affirming an order of the Appellate Division of the Supreme Court of the State of New York, which order was subsequently amended by order of the Appellate Division issued and entered on May 25, 1973 pursuant to a motion made by respondents herein.

Opinions Below

The Court of Appeals affirmed by a 4-3 margin the order of the Appellate Division of the Supreme Court, Second Department. The majority affirmed "on the opinion of the Appellate Division." The minority wrote a long dis-

senting opinion not yet reported. The majority and minority opinions in the Appellate Division are reported at 40 A.D. 2d 211, 338 N.Y.S. 2d 932 (2nd Dept., 1972). The order of the Appellate Division affirmed by the Court of Appeals was subsequently amended by the Appellate Division upon the motion of respondents. All decisions and opinions and the final order of the Appellate Division are included in the appendix to this petition (Appendix pp. A9-A51).

Jurisdiction

The judgment of the Court of Appeals affirming the order of the Appellate Division was entered on May 3, 1973. The order of the Appellate Division was amended in substantial part upon motion of the respondents herein and entered on May 25, 1973. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Question Presented

Whether—in a quasi-judicial hearing conducted by the Board of Standards and Appeals of New York City, whose determination pursuant to this hearing critically affected the property rights of petitioners—the denial by the Board of the right to confrontation and cross examination of witnesses, the right to testimony under oath and the use of the Board's subpoena powers constituted an abridgement of petitioners' constitutional guarantees of due process.

Statement of the Case

Petitioners are the owners of twelve residences located immediately adjacent to the site of property owned by respondents herein and upon which respondents plan to

erect two twenty-story, high-rise apartment buildings. At the time that respondents herein first acquired the land in question (1971), the local zoning ordinance limited the size of such buildings. That limitation was greatly exceeded by the size of respondents' proposed buildings. Respondents' predecessors, however, had been granted yearly extensions of permits to build under the zoning law as it existed prior to 1962 by the New York City Board of Standards and Appeals, the agency which is empowered to administer the zoning regulations of New York City. These extensions were granted from 1963 through 1970 following perfunctory hearings before the Board at which it was the owner's obligation to show *inter alia* that "substantial construction of foundations" had been completed and that it was an "appropriate case" to grant the extensions. In 1971 the respondents applied for a further extension of the permits to build under the old law. A hearing was scheduled for late January 1972 to determine whether still further dispensations from the Zoning Ordinance should be granted. At this hearing the respondents presented evidence of their alleged compliance with the zoning ordinances and also contended that the Board's past action in uniformly granting the previous extensions, of itself, entitled them to the further extension. Petitioners requested that the Board's subpoena power be made available to all and that all parties be entitled to insist upon testimony under oath and confrontation by cross examination (Record of the Board's hearing pp. 983; 761, 762, Appendix pp. A1, A2). The Board denied all such requests. The respondents were allowed to introduce evidence into the record which petitioners had neither previously seen nor had they the opportunity to controvert. Petitioners were thereby severely limited in their opportunity to show a) that respondents had not complied with the requirements of the law; b) that the prior hearings were nothing more than sham proceedings and that even respondents' predecessors had not been entitled to extensions; and c) that these facts were ap-

parent to respondents. This handicap notwithstanding, the Board of Standards and Appeals ultimately denied respondents' applications for extension of permits. Respondents brought certiorari proceedings in New York State Supreme Court, County of Queens. These proceedings were immediately transferred to the Appellate Division of the Supreme Court, Second Department. There petitioners again raised the issue of denial of the rights of cross examination, subpoena power and testimony under oath (Petitioners' Appellate Division brief, pp. 15-16, set forth in Appendix p. A3). That court, in a 3-2 decision ordered that the Board of Standards and Appeals reverse its determination and grant the extension of permits applied for. The decision was appealed to New York's highest court, the Court of Appeals, where the above issues were yet again raised (Petitioners' Court of Appeals brief, pp. 9, 37-38 set forth in Appendix p. A5). The Court of Appeals affirmed in a 4-3 decision "on the opinion of the Appellate Division", the minority writing a lengthy dissent.

The majority opinion of the Appellate Division did not *specifically* treat petitioners' (intervenor-respondents in the proceedings below) contentions concerning the denial of the above referred to rights, however, that cannot alter the fact that the issue was raised and passed upon by both courts—implicitly—in their determinations.

At this point, it may be helpful to the Court to point out certain facts bearing upon the jurisdictional requirement that application for a writ be filed within ninety days after entry of judgment or decree as specified in 28 U.S.C. § 2101(c). In this case, the decision of the Court of Appeals, affirming an order of the Appellate Division, was rendered on May 3, 1973 which is also the date of the remittitur to the Appellate Division. It would ordinarily be assumed that the prescribed period would begin to run from that date. Here, however, the respondents moved to

amend the original order of the Appellate Division. The amendment which they sought was not merely to effect a change in form in the nature of a correction, but was substantial. The original order affirmed by the Court of Appeals required the Board of Standards and Appeals to grant an extension of permits for one year from the date of the order, December 26, 1972. Respondents herein, not satisfied with an extension lasting until December, 1973, moved the Appellate Division to amend its prior order so as to provide that the one year extension begin to run from May 7, 1973. This motion was opposed on the merits by the Office of the Corporation Counsel of the City of New York representing the Board, in whose papers the petitioners herein joined. The order of the Appellate Division, which granted respondents' motion (set forth in the Appendix p. A49), was issued and entered on May 25, 1973. It is from that date that the ninety day period properly begins to run. (On this point see generally annot., 87 Lawyers' Ed. 257, 264.)

REASONS FOR GRANTING THE WRIT

I Petitioners were denied fundamental rights necessary for the rendering of due process as required by the Constitution and by the decisions of this Court.

The question before the Court is one of enormous importance—the adherence of an administrative board which affects the property rights of thousands of people each year to the procedural requirements of the Constitution. The issue is not limited merely to the City or even the State of New York. There is substantial dispute throughout the entire country as to the procedural prerequisite of hearings involving questions of zoning. (See generally cases cited in the annotation at 27 ALR 3d 1304; *In re Coleman*, 242 So. 2d 602 (La. App., 4th Cir. 1970); 2 Rathkopf, The Law of Zoning and Planning, Ch. 43 (Third Ed. 1966).

This Court has held many times that an administrative board acting in a judicial or quasi-judicial capacity, though acting informally and disregarding technical rules of evidence, nevertheless, may not dispense with any essential elements of a fair trial. Any party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. (*Interstate Commerce Comm.* v. *Louisville and Nashville R.R.*, 227 U.S. 83, 93. See also *Morgan* v. *United States*, 304 U.S. 1, 18-19; *Greene* v. *McElroy*, 360 U.S. 474, 497; *West Ohio Gas Co.* v. *Commission* [*No. 1*], 294 U.S. 63, 70-71; *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 339-340; *Kwock Jan Fat* v. *White*, 235 U.S. 454, 463-464; *Reilly* v. *Pinkus*, 338 U.S. 269, 275-276.)

That the hearing before the Board of Standards and Appeals was quasi-judicial in nature cannot be denied. It was necessarily so deemed by the New York courts by their transference of respondents certiorari proceeding challenging the decision of the Board from the lower court directly to the Appellate Division. (See *Weinstein, Korn, Miller*, N.Y. Civil Practice Par. 7804.09 pp. 78-122 to 78-123; Par. 7803.08 pp. 78-67 to 78-69); See also, 2 Rathkopf, The Law of Zoning and Planning, Ch. 44 at 44-1 (Third Ed. 1966)).

It is also eminently clear that petitioners herein had at stake substantial rights involving the value of their individual properties and the general ecology of the area in which they and their families reside. Petitioners' brief before the Court of Appeals set forth a litany of references to the record of the hearing before the board—indicating points at which evidence of the detriment to the community necessarily resulting from the erection of respondents' buildings was introduced (Appendix p. A7). Indeed, the dissenting opinion of Justice Munder in the Appellate Division, concurred in by Justice Martuscello, took specific

notice of such evidence (333 N.Y.S. 2d 932, 942-943). (Appendix pp. A32, A33)

The record of the hearing before the Board of Standards and Appeals shows clearly that the petitioners herein requested and were denied certain procedural rights which denials effectively deprived them of the opportunity to contest and controvert evidence submitted by respondents and thereby, infringed upon their rights to due process. As mentioned previously petitioners' brief in the Appellate Division sets forth those places in the record at which petitioners' many requests and the Board's denials appear. (Appendix p. A3) At this point, and in the interest of brevity, we simply refer this Court to that brief for a description of the content of those references. Should the Court grant this petition, the entire record before the Court of Appeals including the entire minutes of the subject hearing before the Board will, of course, be furnished.

It is important to note that the due process issue is not rendered moot by the fact that the Board's determination was favorable to the petitioners. The subsequent reversal by the Appellate Division of the determination of the Board and the affirmance of the Appellate Division by the Court of Appeals was necessarily based, at least in part, upon the record of the proceeding before the Board. Even assuming that petitioners herein were not prejudiced at all, this Court has held that actual prejudice need not be shown in order to establish denial of due process. *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424, *Rees* v. *City of Watertown*, 86 U.S. 107; *Brookhardt* v. *Janis*, 384 U.S. 1

II The issue of procedural safeguards necessary in proceedings before Zoning Boards needs to be determined.

The importance of this question and the necessity of this Court to pass upon it cannot be overemphasized. There is hardly a right which is more fundamental, more en-

grained into the fiber of this Country or more well protected by our Constitution than the right to own and enjoy real property. Yet we find throughout the Country a situation where local administrative agencies are daily determining crucial property interests of thousands of people without the fundamental protections necessary to guarantee due process. (See *Colagiovanni* v. *Zoning Board of Review of City of Providence*, 90 RI 329, 158 A2d 158 (Sup. Ct. 1960); *Zimarino* v. *Zoning Board of Review of the City of Providence*, 95 RI 383, 187 A2d 259 (Sup. Ct. 1963); *In re Coleman*, 242 So. 2d 602 (La. App. 1970). But see *Wadell* v. *Board of Zoning Appeals of City of New Haven*, 136 Conn. 1, 68 A2d 152, 156 (1949); *Somerset* v. *Montgomery County Board of Appeals*, 245 Md 52, 225 A2d 294 (1967) for cases holding that in an adversary proceeding before an administrative zoning authority, the opportunity for reasonable cross examination is a basic right which cannot be denied. Also, see generally annot., 27 ALR 3d 1304 and cases cited within the annotation.)

III The decisions below were incorrect.

Finally, the correctness of the decisions below—even assuming that the prerequisites of due process were complied with at the hearing before the Board—is open to serious question. The Board of Standards and Appeals, experts on questions of zoning, unanimously voted (5-0) not to extend the permits to build under the old law finding upon the record that respondents had not proven that "substantial construction of foundations" had taken place and further finding that it was not an "appropriate case" to exercise its discretion to grant an additional extension of time to complete construction. The Appellate Division of the Supreme Court in a 3-2 decision reversed the Board and ordered that it grant extensions until December 26, 1973—the majority choosing to ignore the severe effects which its order would wreak upon the local environment while finding

that the respondents had acquired a vested right to continued extensions by virtue of the previous action of the Board and by the expenditures of money made in reliance thereon. The Court of Appeals, in a 4-3 decision, affirmed —the majority writing no opinion—while the dissentors, in an extremely well-reasoned ten-page opinion demonstrated why they felt that "the people of Queens, who after more than eleven years and seven extensions of this building permit and upkept promises of completion are at last entitled to the benefits of the 1960 Zoning Resolution."

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment of the New York State Court of Appeals which affirmed the order and opinion of the Appellate Division.

Respectfully submitted,

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Counsel for Petitioners.

August 17, 1973.

APPENDIX

Excerpt From the Record of the Hearing Before the Board of Standards and Appeals in Which Petitioners Raise the Issue of Due Process (p. 983).

• • •

6. THE OPPONENTS WILL NEED THE USE OF THIS BOARD'S SUBPOENA POWER AND THE RIGHT OF CROSS EXAMINATION IN ORDER TO MAKE ITS OPPOSITION MEANINGFUL.

In the past, decisions have been arrived at by this Board on the basis of representations made by applicants which the opponents had no opportunity to intelligently dispute. The applications presently before this Board contain much information regarding costs, and other matters, which ought to be examined into. This can only be done by subpoenaing the appropriate books and records of the Lefrak Organization unless they are voluntarily produced. A fair opportunity to oppose would also require an opportunity to cross-examine. The writer submits that a denial of these rights under the circumstances would be unconstitutional.

Excerpt From the Record of the Hearing Before the Board of Standards and Appeals in Which Petitioners Raise the Issue of Due Process (pp. 761-762).

* * *

Mr. Cuomo: For the record, I wish to preserve my objection on the grounds that the papers are obviously deficient. I recommend to the Board that it dismiss the application. You have refused to. And, for the record, that is duly noted, I assume.

I would also like to apply further for the opportunity to see this information in advance of the next hearing, when it is submitted, and beyond that I would ask for the opportunity to subpoena what additional records we might deem needed in order to prepare our opposition and to have the right to cross-examine Mr. Lefrak's witnesses, which right now I take it, under the Charter, you have the power to give us.

It seems to me that in order to make our opposition meaningful here, we would need the opportunity to inquire beyond the face of the documents that they are going to hand you. And so for that reason I would ask for an opportunity to inquire into these papers when delivered, an opportunity to subpoena witnesses as needed, in the judgment of the Board, and an opportunity to cross-examine whatever witnesses Mr. Lefrak produces. Of course, they would have similar rights with respect to us.

Petitioners' Appellate Division Brief (pp. 15 and 16): portions in which petitioners (intervenor-respondents in that proceeding) raise the issue of due process.

• • •

The evidence in the record overwhelmingly supports the Board's determination.

The substantial evidence test which controls here is more than met in this record. (*Stork Restaurant* v. *Boland,* 282 N.Y. 256 (1940); *Miller* v. *Kling,* 291 N.Y. 65, 68-69 (1943)).

Petitioners were treated with extreme generosity by the Board throughout the conduct of the hearing. They were the beneficiaries of special dispensations and of a number of rulings which were highly prejudicial to the objectants. Thus, at the outset of the hearing the attorney for many of the objectants insisted that since the hearing was to be quasi-judicial in nature, the Board's subpoena power should be made available and all parties should be entitled to insist upon an oath and cross examination (983; 761-762). See *Hecht* v. *Monaghan,* 307 N.Y. 461 (1954). The request was denied without explanation. Early in the hearing it became clear that the petitioners' application was vitally deficient. Indeed the Board ruled that petitioners had failed to file sufficient supporting data to justify the extensions (754). Over objectants' protest, the Board afforded petitioners a further opportunity to supply proof and in fact, detailed the nature of the proof which it would consider adequate (754-763). In the past, when other objectants were regularly deficient in the proof they presented, the Board had never offered a similar second chance (759). Though petitioners were ordered to serve copies of their documentary evidence on objectants so they would have a full opportunity to refute (775-776), they blatantly refused to do so, but again objectants' pro-

tests were ignored (1914-1918; 2026-2027; 1828-29). The third day of the hearing was set aside for concluding arguments and the Board specifically ruled that no additional evidence would be admissible. Nevertheless—again despite objectants' protest—the Board permitted petitioners to introduce for the first time various facts and figures which objectants had not seen and had no opportunity to controvert. On that last day the Board also accepted from petitioners a written argument from petitioners' principal, Mr. Samuel Lefrak, notwithstanding that the letter had been submitted to the Board surrepetitiously with no notice to the adversaries. This letter was discovered and objectants were able to comment upon it, but it clearly should not have been accepted in the first place (70-78). When petitioners started their proof by filing so-called letters of consent and endorsement from various alleged owners in the vicinity who were said to have favored construction of the proposed high risers (775-776; 781-784), none of the so-called consentors were produced. Objectants' plea for an opportunity to investigate and confront these out-of-court witnesses was ignored (790-91), as was their challenge to a purported statement of position in favor of petitioners from the Queens Chamber of Commerce (787-789; 790-91).

All in all, the suggestion that petitioners were in any way taken advantage of by the procedure employed by the Board at the hearing is belied by the record. The complaint, if any, should come from objectants.

Petitioners Court of Appeals Brief: portions in which petitioners raise the issue of due process (pp. 8-9, 37-38).

Questions Presented

* * *

4. Even assuming the Court could properly undo the Board's determination on this record, should it render judgment on the merits or remand the matter for a new determination by the Board in view of the fact that a new legal context has been created and the further fact that the objectants were denied certain fundamental rights at the prior hearing?

Although objectants had argued below that at most Lefrak would have been entitled to a remand to the Board, the majority in the Appellate Division failed to comment on that argument and simply ordered the Board to issue permits without the opportunity for any further judgment on the merits and notwithstanding the deprivation of objectants' rights at the first hearing.

* * *

POINT IV

In no event should the Appellate Division have rendered judgment on the merits. In view of the fact that the majority decision created a legal context different from the one in which the Board had made its original determination, and the further fact that objectants were denied certain fundamental rights at the hearing, the Appellate Division at most should have ordered a remand.

As noted in the previous points the majority in the Appellate Division appears to have treated Lefrak's petition as an application for hardship relief. It obviously avoided

determining the case on the basis of the criteria set out in 11-324(a); nowhere does the majority even suggest that substantial construction of foundations were completed by Lefrak or that the case was in fact "an appropriate one". Under such circumstances the ordering of a judgment on the merits denies the Board the opportunity to exercise its primary discretionary jurisdiction within the bounds of the law as construed by the Appellate Division. Intervenors are persuaded that Lefrak was entitled to no relief at all. But if this Court can agree with the rationale of the majority in the Appellate Division, then nevertheless the matter should at least be left for the Board's ultimate determination. Thus, upon remand the Appellate Division might have instructed the Board to conduct a new proceeding pursuant to Section 72-11 to 72-23 of the Zoning Resolution which sections were designed for precisely the type argument Lefrak appears to have made below and which the Appellate Division majority appears to have adopted (See *Scripps Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1941); *Matter of Nash* v. *Brooks*, 276 N.Y. 75, 81 (1937); *Matter of 125 Bar Corp.* v. *State Liquor Auth.*, 24 N.Y.2d 174, 180 (1969)).

There is another and further reason why Lefrak ought not to be granted an absolute judgment. The proceeding below has been deemed, by virtue of its transference to the Appellate Division, to be quasi-judicial in nature (See 8 Weinstein, Korn, Miller, N.Y. Civil Practice Par. 7804.09, pp. 78-122 to 78-123; Par. 7803.08 pp. 78-67 to 78-69). In view of that, objectants were entitled to the basic rights of sworn testimony and confrontation. (*Hecht* v. *Monaghan*, 307 N.Y. 461 (1954)). To enter judgment now against objectants is to have deprived them of these constitutional rights. This argument was made below and never responded to either by Lefrak or the Appellate Division majority.

* * *

Petitioners' Court of Appeals Brief: references to record of hearing before the Board at which evidence of detriment to petitioners was introduced (pp. 24-25).

There was ample basis for the Board's finding that this was not an appropriate case for an extension.

As already noted Lefrak was required to meet at least two separate criteria before proving his entitlement to further extensions: "appropriateness" was one of these. The Board's specific finding that Lefrak failed to meet this test (Finding w) p.40a of Lefrak Appendix in the Appellate Division) was at least as amply supported in the record as was their finding of no substantial construction. The record shows that in the more than a decade which followed the adoption of the new ordinance and preceded Lefrak's appearance on the scene, evidence of the Planning Commission's good judgment in proscribing high-risers in this area mounted dramatically. Dozens of witnesses testified that in the interval since the effective date of the new zoning in 1961 the area had become less and less capable of bearing the burden of two huge 20 story high risers. The scale of the community had been fixed and these buildings would loom up and over the surrounding buildings as giant concrete intrusions. This is best shown by the scale model of the locality with and without the high risers, and the photographs of the model, submitted to the Board (2020; 2033). With the gross violation of scale would come a dangerous and damaging suffocation of community facilities—schools, transportation, fire protection facilities, parking—would all be adversely affected. This was the judgment of the City Planning Commission which is after all, New York City's agent for planning and design of the City's development (874-75). It was the opinion of the private urban planner and de-

signers who testified (2029-33; 2098-99). It was the opinion of the numerous political representatives who testified (899-924). And it was supported by a carefully documented, powerfully persuasive compendium of facts, figures and statistics submitted by one of the community groups (2101-2128). Opposed to all of this was virtually no testimony at all from applicants. Lefrak's answer to the compelling ecological and practical arguments made by these scores of objectants was that the free enterprise system entitled Lefrak to his windfall—at their expense.

The Board unanimously agreed with the objectants on the question of appropriateness as did both dissenters below (113A-114A). The majority failed even to discuss the question.

In short, the record not only contains substantial evidence in support of the findings of the Board as to Lefrak's failure to substantially complete foundations by December 15, 1971, but in fact the proof was overwhelmingly to that effect. It is just as clear that there was sound basis in the record for finding that this was not an appropriate case for an extension.

• • •

The February 10, 1972 determination of the Board of Standards and Appeals

*CORRECTIONS

Those portions of the minutes of the meeting of the Board of Standards and Appeals held on February 10, 1972, as they appeared in Bulletin No. 8, Vol. 57, are hereby corrected to read as follows:

1687-BZY—Vol. VIII—B.Q.—118-18 Union Turnpike, Block 3335, Lot 23, N.B. 1580-61.

APPEARANCES—

For Applicant: Murray Rudman, Aaron Halpern, Jack Brown, Sam Sardatt.

For Opposition: M. M. Cuomo, Lawrence Gross, Ann Kirby, Art Heimbold, Richard Naar, E. Philip Herman, Helen Knorr Johnson, John F. Fitzsimon and others.

NEUTRAL—Peter Slenis.

ACTION OF BOARD—Application for extension of time, denied.

THE VOTE TO GRANT—

Affirmative: *0*

Negative: Chairman Galvin, Vice Chairman Becker, Commissioner Klein, Commissioner Madigan and Commissioner Nolan *5*

THE RESOLUTION—

WHEREAS, the Board has held public hearings in this matter on January 25, 1972, and February 3, 1972, and

* The vote has been corrected as shown above in italics.

The February 10, 1972 determination of the Board of Standards and Appeals.

heard final arguments from the Applicant and the opposition on February 10, 1972; and

WHEREAS, the Board has thoroughly reviewed the evidence submitted by both the Applicant and the Objectors and the entire transcript of the hearings dated January 25, 1972, and February 3, 1972; and

WHEREAS, the Board finds that the Applicant did not have a possessory interest in the property in question, pursuant to Section 11-321 of the Zoning Resolution as of June 15, 1963; and

WHEREAS, the Board finds from the entire record submitted in this case that the Applicant was not in a possessory interest during prior extensions and was cognizant of the prior litigation and decisions of this Board, and that this Applicant has not proved that substantial construction of foundations on his part has taken place prior to December 15, 1971; and

WHEREAS, the Board finds from the entire record submitted that this is not an appropriate case to exercise its discretion to grant an additional extension of time to permit the completion of construction to December 15, 1972.

Resolved, that the application for an additional extension of time under Section 11-324(a) of the Zoning Resolution be denied.

A true copy of resolution adopted by the Board of Standards and Appeals February 10, 1972. Printed in Bulletin No. 9, Vol. LVII.

THOMAS F. GALVIN
Chairman.

Copies Sent
To Applicant
Fire Com'r.
Borough Supt.

The February 10, 1972 determination of the Board of Standards and Appeals

*CORRECTION

Those portions of the minutes of the meeting of the Board of Standards and Appeals held on February 10, 1972, as they appeared in Bulletin No. 8, Vol. 57, are hereby corrected to read as follows:

1688-BZY—Vol. VIII—B.Q.—118-17 Union Turnpike, Block 3334, Lot 151, N.B. 1579-61.

APPEARANCES—

For Applicant: Murray Rudman, Aaron Halpern, Jack Brown, Sam Sarpatt.

For Opposition: M. M. Cuomo, Lawrence Gross, Ann Kirby, Art Heimbold, Richard Naar, E. Philip Herman, Helen Knorr Johnson, John F. Fitzsimons and others.

NEUTRAL: Peter S. Lewis.

ACTION OF BOARD—Application for extension of time denied.

THE VOTE TO GRANT—

Affirmative: *0*

Negative: Chairman Galvin, Vice Chairman Becker, Commissioner Klein, Commissioner Madigan and Commissioner Nolan *5*

THE RESOLUTION—

WHEREAS, the Board has held public hearings in this matter on January 25, 1972, and February 3, 1972, and heard final arguments from the Applicant and the opposition on February 10, 1972; and

---

* The vote has been corrected as shown above in italics.

The February 10, 1972 determination of the Board of Standards and Appeals.

WHEREAS, the Board has thoroughly reviewed the evidence submitted by both the Applicant and the Objectors and the entire transcript of the hearings dated January 25, 1972, and February 3, 1972; and

WHEREAS, the Board finds that the Applicant did not have a possessory interest in the property in question, pursuant to Section 11-321 of the Zoning Resolution as of June 15, 1963; and

WHEREAS, the Board finds from the entire record submitted in this case that the Applicant was not in a possessory interest during prior extensions and was cognizant of the prior litigation and decisions of this Board, and that this Applicant has not proved that substantial construction of foundations on his part has taken place prior to December 15, 1971; and

WHEREAS, the Board finds from the entire record submitted that this is not an appropriate case to exercise its discretion to grant an additional extension of time to permit the completion of construction to December 15, 1972.

Resolved, that the application for an additional extension of time under Section 11-324(a) of the Zoning Resolution be denied.

A true copy of resolution adopted by the Board of Standards and Appeals February 10, 1972. Printed in Bulletin No. 9, Vol. LVII.

THOMAS F. GALVIN
Chairman.

Copies Sent
To Applicant
Fire Com'r.
Borough Supt.

Appellate Division, Order of Reversal Appealed to Court of Appeals

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 26, 1972.

HON. JAMES D. HOPKINS,

Acting Presiding Justice

HON. FRED J. MUNDER,
HON. M. HENRY MARTUSCELLO,
HON. FRANK A. GULOTTA,
HON. A. DAVID BENJAMIN,

Associate Justices

In the Matter of

LEFRAK FOREST HILLS CORP., *et al.*,

Petitioners,

v.

THOMAS F. GALVIN, *et al.*, constituting the Board of Standards and Appeals of the City of New York, *et al.*,

Respondents,

and

FREDERIC S. BAUM, *et al.*,

Intervenors-Respondents.

Order of Reversal Appealed to Court of Appeals.

In the Matter of

FRANKLIN NATIONAL BANK,

Petitioner,

v.

THOMAS F. GALVIN, *et al.*, constituting the Board of Standards and Appeals of the City of New York, *et al.*,

Respondents,

and

FREDERIC S. BAUM, *et al.*,

Intervenors-Respondents.

The above named Lefrak Forest Hills Corp. et al., and Franklin National Bank, petitioners having instituted two separate proceedings, pursuant to article 78 of the CPLR and section 668e-1.0 of the Administrative Code of the City of New York, by petitions verified March 10, 1972, to annul a determination of the Board of Standards and Appeals of the City of New York, made on February 10, 1972, which denied applications by petitioners Lefrak Forest Hills Corp. and Lefrak Kew Gardens Corp. for extensions of building permits for construction of apartment buildings; and respondents and intervenors-respondents having filed answers to the petitions; by two orders of the Supreme Court, Queens County, dated respectively May 11, 1972 and May 16, 1972, the proceedings were transferred to this court for determination; the proceedings having been argued by Murray Rudman, Esq., of counsel for petitioner Franklin National Bank; by Charles G. Moerdler,

Esq., of counsel for petitioners Lefrak; by Jesse J. Fine, Esq., of counsel for respondent Board of Standards and Appeals; and by Mario Matthew Cuomo, Esq., of counsel for intervenors-respondents; due deliberation having been had thereon; and upon the Opinion by Hopkins, Acting P.J., and the decision slip of the court herein, heretofore filed and made part hereof; it is:

ORDERED that the determination is hereby annulled, on the law, without costs, and Board of Standards and Appeals directed to issue an extension of the permits for one year beginning from the date of the entry of this order (December 26, 1972).

GULOTTA and BENJAMIN, JJ., concur.

MUNDER and MARTUSCELLO, JJ., dissent and vote to confirm the determination and dismiss the petitions, with dissenting opinion by Munder, J., in which Martuscello, J., concurs.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

—— A D 2d——

A—September 25, 1972

1466 E,

1530 E.

In the Matter of Lefrak Forest Hills Corp., et al., petitioners, v. Thomas F. Galvin et al., constituting the Board of Standards and Appeals of the City of New York, et al., respondents, and Frederic S. Baum et al., intervenors-respondents.

Order of Reversal Appealed to Court of Appeals.

In the Matter of Franklin National Bank, petitioner, v. Thomas F. Galvin et al., constituting the Board of Standards and Appeals of the City of New York, respondents, and Frederic S. Baum et al., intervenors-respondents.

Two proceedings pursuant to article 78 of the CPLR and section 668e-1.0 of the Administrative Code of the City of New York, made on February 10, 1972, which denied applications by petitioners Lefrak Forest Hills Corp., and Lefrak Kew Gardens Corp. for extensions of building permits for construction of apartment buildings.

Determination annulled, on the law, without costs, and Board of Standards and Appeals directed to issue an extension of the permits for one year beginning from the date of the order entered hereon.

Opinion by HOPKINS, Acting P.J.

GULOTTA and BENJAMIN, JJ., concur.

MUNDER, J., dissents and votes to confirm the determination and dismiss the petitions, with an opinion, in which MARTUSCELLO, J., concurs.

December 26, 1972

In Re Lefrak v. Galvin 1466 E,

In Re Franklin National Bank v. Galvin 1530 E

Opinion of Appellate Division

December 26, 1972

SUPREME COURT

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

HOPKINS, Acting P.J.,

MUNDER, MARTUSCELLO, GULOTTA and BENJAMIN, JJ.

[SAME TITLE]

Two proceedings pursuant to article 78 of the CPLR and section 668e-1.0 of the Administrative Code of the City of New York to annul a determination of the Board of Standards and Appeals of the City of New York, made on February 10, 1972, which denied applications by petitioners Lefrak Forest Hills Corp. and Lefrak Kew Gardens Corp. for extensions of building permits for the construction of apartment buildings. The proceedings were transferred to the Appellate Division (CPLR 7804, subd. [g]) by two orders of the Supreme Court, Queens County, dated respectively May 11, 1972 and May 16, 1972.

Stroock & Stroock & Lavan (Charles G. Moerdler, Nathan Z Dershowitz, Robert P. Stein, Richard S. Lame and Stephen Hochberg of counsel), for petitioners Lefrak Forest Hills Corp. and Lefrak Kew Gardens Corp.

Murray Rudman for petitioner Franklin National Bank.

Norman Redlich, Corporation Counsel (Jesse J. Fine of counsel), for respondents.

Corner, Finn, Cuomo & Charles; and Gering, Gross & Gross (Mario Matthew Cuomo of counsel), for intervenors-respondents.

Opinion of Appellate Division

HOPKINS, Acting P.J.

The question before us is whether the Board of Standards and Appeals of the City of New York improperly denied the applications of petitioners Lefrak Forest Hills Corp. and Lefrak Kew Gardens Corp. (hereinafter called Lefrak) for a further extension of permits first issued in 1963 and successively extended until December 15, 1971 to build an apartment house project on property located in the Kew Gardens-Forest Hills area in Queens County. We hold that the applications were improperly denied, that the board's determination should be annulled and that Lefrak's applications should be granted.[1]

The simplicity of the question cannot veil the complexity of the facts revealed by the history of the project. The ultimate legal issue, however, in our view, is whether the reciprocal actions of the board in granting the past extensions and of Lefrak and the predecessor owners of the property in making improvements to the property and incurring obligations in reliance on the permits have given rise to the vesting of rights and equitable considerations which now cannot be abrogated.

In 1961 the Long Island Railroad owned the property, a part of its right of way. In March of that year the railroad agreed to sell it to Adson Industries, Inc. for the construction of apartment houses over the right of way. As a part of the sale, a perpetual easement over the property for railroad purposes was reserved to the railroad.

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[1] Two proceedings were argued before us and are here considered: (1) by Franklin National Bank to annul the determination denying an extension of building permits; and (2) by Lefrak Forest Hills Corp. and Lefrak Kew Gardens Corp. for the same relief. Each proceeding presents similar facts and issues.

That is to say, the buildings were to be constructed over the railroad right of way. Effective December 15, 1961 a new zoning resolution was enacted by the City of New York in 1960. The present controversy arises from the terms of that resolution.

The new zoning resolution prevented the erection of high rise apartment developments in the Forest Hills-Kew Gardens area. It permitted apartment houses, but at a density and scale lower than that contemplated by Adson. The new resolution, moreover, authorized the issuance of building permits for construction allowed under the old law (1960 Zoning Resolution, § 11-321); by amendment in 1963 the Board of Standards and Appeals was empowered to extend such permits for a major development for a period of two years (1960 Zoning Resolution, § 11-322). Adson applied in 1961 for permits for the construction of two apartment buildings conforming to the old law, and in the summer of 1963, final permits for that construction were issued. In the meantime Adson had assigned its rights under the contract of sale with the railroad to two wholly owned subsidiaries, Park Lane Plaza North, Inc. and Park Lane Plaza South, Inc.

The issuance of the building permits produced litigation. Certain of the intervenors in these proceedings appealed to the board and, in November, 1963, the board determined that the permits were proper.[2] That determination was contested by proceedings under article 78 of the CPLR which were dismissed (*Matter of Brunschwig* v. *Foley*, 24 A D 2d 555, mot. for lv. app. den. 16 N Y 2d 487; *Matter of Fleming* v. *Foley*, 43 Misc. 2d 280).

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[2] The contract of sale with the railroad was itself unsuccessfully challenged in court (*Brunchwig* v. *Long Is. R. R. Co.*, 41 Misc 2d 24).

At the time of the expiration date of the permits—December 15, 1963—work had commenced on the project but of course had not been completed. In March, 1964 the board granted an extension of the permits for two years, finding that the project was a "major development" and that substantial construction of the foundations of at least one of the buildings had occurred. That determination was again attacked by certain of the intervenors in these proceedings and again the attack failed (*Matter of Brunschwig* v. *Foley*, 25 A D 2d 495; *Matter of O'Brien* v. *Foley*, 25 A D 2d 496).

In 1964 the 1960 Zoning Resolution was amended by the addition of a provision authorizing the board in appropriate cases to grant extensions of time, "each limited to one term not to exceed one year," for the completion of any building for which substantial construction of foundations had been completed at the time of the expiration of the preceding extension—(1960 Zoning Resolution, § 11-324).[3]

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[3] The amendment reads as follows:

"11-324

Further extensions

For minor or major developments for which extensions of time have been authorized in accordance with the provisions of Section 11-322 (Extension of period to complete construction) or Section 11-323 (Extension for development subject to delay), but which have not been completed within the term of the extension, the Board, upon application filed before the expiration date of the term of the preceding extension, may in appropriate cases grant additional extensions of time, each limited to one term not to exceed one year;

(footnote continued on following page)

(footnote continued from preceding page)

(a) For the completion of any *building* for which the Board finds that, on or before the date of expiration of the term of the preceding extension, substantial construction of foundations has been completed, or

(b) For the completion of any *building* for which an extension of time was authorized under the provisions of Section 11-323, but for which substantial construction of foundations has not been completed within the term of the preceding extension, provided that the Board finds that:

(1) the criteria under which the preceding extension was permissible would excuse applicant's failure to complete such amount of construction, or

(2) applicant was prevented from completing such amount of construction by other hardship or inequity beyond his control, not including real estate market conditions or difficulties in obtaining the necessary financing.

For any such building which is not completed and for which such application for an additional extension of time is not filed before the expiration date of the term of the preceding extension, or is denied, the building permit shall lapse on such expiration date or on the date of such denial.

For other construction for which an extension of time has been authorized in accordance with the provisions of Section 11-322 (Extension of period to complete construction), but which has not been completed within the term of the extension, the Board, upon application filed no later than 30 days after the expiration date of the term of the preceding extension or 30 days after the effective date of this amendment (June 11, 1964), whichever is the later date, may in appropriate cases grant only one additional extension of time limited to a term not to exceed one year, for completion of any such construction, for which the Board finds that, at the time the application is filed, a substantial portion of such construction has been completed and

(footnote continued on following page)

Taking advantage of those provisions, Adson applied in December, 1965 for a further extension of the permits; in March, 1966 the board granted an extension for one year —the subject of yet another contest which came to naught (*Matter of Brunschwig* [*Foley*] [Sup. Ct. Queens County], N.Y.L.J., June 26, 1967, p. 18, col. 8; *Matter of O'Brien* [*Foley*] [Sup. Ct., Queens County], N.Y.L.J., June 26, 1967, p. 18, col. 8).

Again, in 1966 Adson applied for another extension until December, 1967, which was granted; and, again, the action of the board was sustained after challenge by proceedings under article 78 of the CPLR (*Matter of Brunschwig* [*Glass*]; *Matter of Fleming* [*Glass*] [Sup. Ct., Queens County], N.Y.L.J., Feb. 4, 1969, p. 22, col. 3). In 1967, however, there was a change in the ownership of the property. Adson defaulted on an $800,000 mortgage held by the Franklin National Bank and the latter purchased the property at a foreclosure sale.

Franklin then applied in 1967 for a further extension; that was granted by the board and the determination upheld by the courts (*Brunschwig* v. *Glass; Matter of Fleming* [*Glass*] [Sup. Ct., Queens County], N.Y.L.J., March 3, 1970, p. 18, col. 1). In 1968 still another extension was granted by the board; proceedings brought to annul that

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(footnote continued from preceding page)

substantial expenditures in connection with such construction has been made.

For any such other construction which is not completed and for which such application for an additional extension of time is not filed within such 30 day period after the expiration date of the term of the preceding extension or 30 days after the effective date of this amendment (June 11, 1964) whichever is the later date, or is denied, the building permit shall lapse."

action were discontinued by stipulation. In 1969 Franklin obtained an extension for another year; proceedings to review the boards' determination were dismissed and affirmed by this court (*Matter of O'Brien* v. *Glass*, —— A D 2d ——, decided herewith).[4]

In 1970 Franklin sought a further extension until December 15, 1971. It informed the board that every effort would be made to secure a builder to complete the construction in 1971. The board granted the extension and proceedings to annul that extension are pending in the Supreme Court, Queens County. Franklin then contracted to sell the property to Lefrak in April, 1971.[5] Between contract and closing on November 30, 1971 Lefrak entered into possession and worked on site preparation. It also changed the original building plans to provide for two 20-story towers; and the building permits were accordingly amended by the Queens Borough Superintendent in August, 1971.

On December 10, 1971 Lefrak applied for an additional one-year extension of the permits. At the hearings before the board Lefrak showed that as of December 15, 1971 about 844 cubic yards of concrete had been installed for foundations and walls, over $600,000 had been incurred for construction expense, over $450,000 in other costs, and over $5,800,000 had been obligated under contracts for the construction. In addition, Lefrak submitted proof that after December 15, 1971 it had installed about 1,629 cubic yards more concrete (a total of about 2,475 cubic yards) and over $400,000 more had been incurred for construction costs (a total of about $1,450,000).

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[4] The question presented by that proceeding was simply the power of the board to grant more than one extension of a permit.

[5] Franklin received $200,000 for the property—$10,000 in cash, and $190,000 by a purchase money mortgage.

The board denied Lefrak's application. It found that (1) Lefrak did not have a possessory interest in the property as of June 15, 1963 or during prior extensions of the permits; (2) Lefrak had not established substantial construction of the foundations prior to December 15, 1971; and (3) this was not an appropriate case for its exercise of discretion. It is of this denial that Lefrak seeks review in its instant proceeding, opposed by the board and the intervenors.

We put aside quickly the board's finding that Lefrak lacks a possessory interest. The board makes no genuine attempt to defend its position on that issue on this appeal. Nothing in the 1960 Zoning Resolution requires a possessory interest as of December 15, 1963 or as of June 15, 1963 (see 1960 Zoning Resolution, §§ 11-322, 11-323, 11-324); nor does it prohibit the transfer of building permits or of the property—a provision which might well be unconstitutional (cf. *Matter of Weinrib* v. *Weisler*, 33 A D 2d 923, affd. 27 N Y 2d 592). Hence, the board's refusal to grant a further extension must be justified by the second and third grounds upon which it relied.

The board's refusal cannot be scanned without regard to the history of its prior actions. That history is epitomized by a series of applications for extensions to build—seven in all—in which the owner implored the board to grant more time to complete the project, the last four of which (since 1967) having been made by a bank which was seeking a builder with the means and ability to undertake a construction of considerable magnitude. When at last the bank succeeded in finding the builder willing to proceed, the board in effect reversed its prior rulings, all of which to date had been sustained by the courts, and determined that the development was not appropriate and that work on the foundations had not been substantially completed.

It is, we think, too late in the chronicle of these proceedings for the board to adopt that conclusion, contrary to all that it decided before.

It is not necessary to invoke the doctrine of *res judicata* against the board, though the considerations of public policy that buttress the doctrine have relevance here. There are different parties in these proceedings from those which brought the earlier proceedings to review under article 78 of the CPLR and, technically, they are not bound by the judgments reached (cf. *Matter of Sullivan*, 289 N. Y. 323; *Robin-Gay Apts.* v. *Berman*, 26 A D 2d 537; but, see *Matter of Evans* v. *Monaghan*, 306 N. Y. 312, 323-324). Nevertheless, the board's construction of the zoning resolution under which it acted and of the circumstances shown in the prior proceedings cannot be arbitrarily jettisoned. The board's determinations in these aspects were reasonable—as the court's judgments concluded—and a regard for the criteria of principled decisions is as applicable to administrative agencies as to courts themselves (cf. *Matter of Demisay, Inc.* v. *Petito*, 33 A D 2d 910; *Matter of Holmes & Murphy* v. *Bush*, 6 A D 2d 200; *Matter of Grand Chapter of Phi Sigma Kappa* v. *Grosberg*, 30 A D 2d 887). "The risk of imposition of some measure of legal consistency by the court upon administrative agencies is part of the tariff that must be paid for whatever advantage can be claimed for review by a law court of the work of an administrator" (*Matter of Dresher*, 286 App. Div. 591, 594). Capricious action in a legal sense is established when an administrative agency on identical facts decides differently (*Matter of Fitzgerald* v. *State Div. of Dept. of Public Serv. of State of N. Y.*, 262 App. Div. 393, 397).

Whether the decision of an administrative board is arbitrary in a given case cannot be resolved by the single

standard that we ascertain if it falls within the board's discretion under provisions of law. In this case the exercise of discretion by the board in denying the extension cannot be disassociated from its exercise of discretion in granting past extensions. If we were to look only at the board's action before us, we would blind our eyes to the equities and rights upon which Lefrak and Franklin might justifiably depend in dealing with the property. That does not mean that the board could not take into account the long delay in completing the construction reflected by the seven previous applications for extensions[*]; but equally it means that the board could not ignore its own determinations to condone the delay and its own findings of substantial construction and appropriateness of the property for the relief granted.

Here the exercise of discretion in refusing another extension is particularly beyond justification in the face of the large expenditures and the contracting of liabilities by Lefrak, on the strength of the extensions, after it had purchased the property. A vested right to finish a nonconforming building matures when substantial work is performed and obligations are assumed in reliance on a permit legally issued (*People ex rel. Ortenberg* v. *Bales,* 224 App. Div. 87, affd. 250 N. Y. 598; *Matter of Jayne Estates* v. *Raynor,* 22 N Y 2d 417, 422-423; *Matter of Glenel Realty Corp.* v. *Worthington,* 4 A D 2d 702; *Collins* v. *Magony,* 31 A D 2d 597). We see nothing in the record that indicates that Lefrak was not behaving in good faith in proceeding as it did under the permits. Indeed, the city authorities gave tacit approval to Lefrak's performance

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[*] The continuing litigation with which the permits and their extensions were burdened might well have been a cause for the delay; we are not able to calculate the extent by which it increased the delay on this record.

by issuing in August, 1971 amended permits authorizing construction under the plans submitted by Lefrak.

It could hardly be expected either by the board or Lefrak that construction of the project of the size contemplated could be accomplished within the year of the last extension. Once the board had embarked on its decision to approve extensions of the right to continue the project, implicitly it accepted the high probability that the project would require further time for final completion. There is no fixed formula which measures the content of all the circumstances whereby a party is said to possess "a vested right"; it is a term, rather, which sums up a judicial determination that the facts of the case render it inequitable that the State impede the individual from taking certain action (cf. *Matter of Humble Oil & Refining Co.* v. *Worthington,* 49 Misc 2d 432). In our view, Lefrak acquired a vested right to proceed under its permits in the light of the combined force of the prior determinations of the board, upheld by the courts, the expenditures made in reliance on the permits prior to the time Lefrak purchased the property, and the expenditures and the assumption of contractual liabilities made by Lefrak in reliance on the permits subsequent to its purchase of the property.

Accordingly, the determination of the board should be anulled, on the law, without costs, and the board directed to issue an extension of the permits for one year beginning from the date of the order entered hereon.[7]

GULOTTA and BENJAMIN, JJ., concur.

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[7] As the last extension expired on December 15, 1971, and this appeal has just reached us, it obviously would benefit Lefrak nothing to direct the issuance of a permit for one year from that expiration date; we have determined that we may in the exercise of our power grant an extension for one year from the date of our order (CPLR 7806, 5522).

Dissenting Opinion of Appellate Division

MUNDER, J. (dissenting). I dissent and vote to confirm the determination of the board and dismiss the petitions.

In my opinion, there is substantial evidence in the record to support the findings of the respondent Board of Standards and Appeals that (1) petitioners Lefrak failed to satisfy the statutory requirement of completion of substantial construction of foundations prior to December 15, 1971, the expiration date of the preceding permit extension; and (2) this is not an "appropriate" case for the granting of a further extension. Although these findings are sufficient, in and of themselves, to support the denial, I agree with the majority that a third finding, Lefrak's lack of a possessory interest in the property in 1963, is not a proper ground for the denial of a further extension.

As respects Lefrak's argument that the seven previous permit extensions herein granted to its predecessors in interest operate as *res judicata* or an estoppel, I note first that we are *not* dealing with a builder who, relying on a valid permit, has proceeded with construction *prior* to a zoning change to a point where he has acquired a vested right to continue and complete the structure (see, e.g., *Matter of Glenel Realty Corp.* v. *Worthington*, 4 A D 2d 702). Rather, we have here a grace period provision which offered landowners the opportunity to secure building permits and begin construction on nonconforming buildings *after* the effective date of the new zoning ordinance [December 15, 1961] (1960 Zoning Resolution, § 11-321). In the event construction was begun but not completed by December 15, 1963, a two-year extension of the building permit could be secured pursuant to section 11-322, provided substantial construction of foundations had been completed prior to December 15, 1963. Section 11-324, enacted in 1964, authorized additional one-year extensions of building

permits, "in appropriate cases", if, as stated in subdivision (a), "on or before the date of the expiration of the term of the preceding extension, substantial construction of foundations has been completed." (Sections 11-323 and 11-324 [subd. (b)] deal with extensions where less than substantial construction of foundations has been completed.)

The original plans and permit applications were filed in April, 1961 by Adson Industries, Inc., then a contract vendee. Permits upon amended plans complying with the pre-1961 zoning law were finally issued in or about August, 1963 and construction was commenced. Thereafter, Adson secured three successive extensions of its building permits pursuant to sections 11-322 and 11-324 (subd. [a]). In 1965, Adson, or more properly two wholly owned subsidiaries to whom the property had been transferred, defaulted on a mortgage held by the Franklin National Bank; and the latter took title upon a sale following a judgment of foreclosure which was entered in 1966. Franklin then secured four additional extensions of the permits pursuant to section 11-324, subd. [a]), the last one expiring on December 15, 1971. In April, 1971 Franklin entered into a contract of sale with Lefrak, which then amended the building plans and did some preliminary site preparation work. After title closed in November, 1971, Lefrak began actual construction work on the foundations. On December 10, 1971, five days before the expiration of the existing permit extensions, Lefrak filed applications for an additional one year extension. This time, however, the extensions were denied.

Preliminarily, I note that the failure to get beyond even the foundation stage of construction in nine years seems to have been due in great part to the very nature of the project, i.e., the construction of two high-rise, middle-income apartment buildings over the tracks of the Long Is-

land Railroad. The necessity of working in the track bed without disruption of the railroad's train schedule presented almost insurmountable problems from the start. After Adson and/or its subsidiaries went bankrupt, it took Franklin National Bank more than four years to find another builder willing to undertake the project and, even then, construction was commenced only after the building plans were modified to eliminate most of the track bed work.

The seven prior extensions herein were granted after rather *pro forma* hearings. Most were upheld in the courts as against only technical challenges by intervening adjacent homeowners. Indeed, compliance with the statutory criterion of "appropriateness" seems never to have been controverted in the past and compliance with the substantial construction requirement only once. Upon the instant hearings, attended by numerous public officials, representatives of local civic associations, homeowners and tenants, these issues were vigorously contested.[1]

Nevertheless, whether or not the board was correct in granting the prior extensions is not the issue here. Nor may those prior determinations raise the bar of *res judicata,* for, among other reasons, the statute (§ 11-324) clearly contemplates that the annual extension applications will each be determined upon evidence of construction completed during the year immediately preceding. Still, the question remains whether the prior extensions, granted upon similar or even less proof of statutory compliance, render the instant denial arbitrary or capricious. I think not.

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[1] Indeed, the board's returns on the seven prior extensions, filed in the Supreme Court, Queens County, comprise a grand total of only 592 pages, with the longest return only 147 pages. The instant record totals 2,144 pages.

Dissenting Opinion of Appellate Division

It is now more than 10 years since the effective date of the new zoning ordinance and, significantly, the last extension herein was secured by the Franklin National Bank on the representation that it would find a builder and *complete* the buildings within 1971, even if it meant taking a substantial loss. Indeed, Franklin even proffered a letter of intent from a builder other than Lefrak. After so much delay, the board had a right to expect that it would be presented with at least a partially completely building if and when a further extension were requested. Yet, all it found upon Lefrak's applications was that construction of the foundations had been started (Lefrak claimed 13% of the foundations had been completed while the intervenors contended only 4% had been completed).[2] Furthermore, Lefrak had modified the building plans and allegedly virtually abandoned whatever construction or site preparation work had been done in the past. While the change in plans was technically permissible so long as the new plans did not increase nonconformity with the new zoning law, Lefrak did not have a *permanent* license to construct a nonconforming building and the board had a right to consider this as a significant change in circumstances since its prior determination.

In addition, there was raised at this hearing, for the first time, a real question as to whether this was an appropriate case for a further extension. Lefrak does not accept the

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[2] The proof submitted on the issue of substantial construction was highly conflicting. Lefrak claimed it had poured 863 cubic yards of concrete as of December 15, 1971. However, its concrete delivery tickets showed only about 300 yards poured as of that date. Lefrak also claimed it had paid or incurred $600,000 in construction and related expenses prior to December 15, 1971 and had additional contractual commitments in the millions. The intervenors not only cast doubt upon the legitimacy of many of these alleged expenditures but contended that many would not have to be honored at all if the permit extension were denied.

board's "definition" of the appropriateness criterion and argues that it improperly treated the applications as one for a variance. However, I believe the statutory language to be sufficiently specific (*Chiropractic Assn. of New York* v. *Hilleboe,* 12 N Y 2d 109, 120; *Matter of City of Utica* v. *Water Pollution Control Bd.,* 5 N Y 2d 164, 169-170) and to denote something other than mere proof of completion of substantial construction of foundations or physical evidence of a commitment to build, which is really the same thing. In other words, even if the substantial construction requirement is met, the board still retains a measure of discretion in determining whether the case is an appropriate one for a further extension. Without attempting to limit the bounds of that discretion, I believe that the question of whether the proposed development is still in the public interest must come into play at this point and that the new evidence presented thereon was almost unanimously against this development and virtually uncontradicted.

Thus, for example, it was shown that the proposed 20-story twin towers will not only be grossly disproportionate to the immediate area, which consists solely of private homes and four- to six-story apartment buildings, but that the market for such conventionally financed "middle-income" housing is already glutted and schools and public transportation overcrowded. In addition, the only access to the proposed Lefrak towers is from Union Turnpike. A half-block away, traffic in and from the Interboro Parkway and Queens Boulevard converges and conditions are such that parking is not even permitted in this section of the Turnpike during daylight hours. Furthermore, the Turnpike is divided into one-way segments at this point, the divider being the depressed Interboro Parkway. Although Lefrak plans a substantial setback and turnaround

driveway for each building, cars proceeding west on the Turnpike would have a difficult time getting to the building abutting the eastbound lanes, and vice versa. Finally, there was also testimony that one moving van or one fire engine could effectively block the Turnpike to all traffic; that the parking problem is already so bad that Forest Hills Gardens, which abuts this development to the northwest, has had to institute a towaway program to remove parked cars from its private streets; and that the sidewalks are so narrow near one of the proposed Lefrak buildings that the city had to install metal barricades to protect pedestrians from automobiles.

In short, under all the circumstances here presented, I find that the board was not bound by the prior extensions granted Lefrak's predecessors in interest and that the instant denial of a further extension of the building permits should be upheld as based upon substantial evidence in the record.

MARTUSCELLO, J., concurs.

Court of Appeals—Decision and Dissenting Opinion.

COURT OF APPEALS

State of New York

In the Matter of the Application of

LEFRAK FOREST HILLS CORP., and
LEFRAK KEW GARDENS CORP.,

Petitioners-Respondents,

—against—

THOMAS F. GALVIN, SAMUEL L. BECKER, JOSEPH B. KLEIN, FRANCIS W. MADIGAN and WILLIAM A. NOLAN, and their successors in office as constituting the Board of Standards and Appeals of the City of New York, THE BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, THE DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents-Appellants,

FREDERICK S. BAUM, ALAN BLOOM and ROSALYN BLOOM, his wife, WILLIAM J. FLEMING, JOHN J. KEATING and NANCY KEATING, his wife, DOLORES CARROLL and FLORENCE JENKINSON, GRACE HOLLIS, BRUCE L. HOWARD, TAKOOHI KAZIGIAN, DRAGUTIN HERZOG, EDITH ROSENBERGER and MAX R. BRUNSCHWIG,

Intervenors-Appellants.

Queens County Clerk's Index No. 1933/1972

In the Matter of the Application of

FRANKLIN NATIONAL BANK,

Petitioner-Respondent,

—against—

THOMAS F. GALVIN, SAMUEL L. BECKER, JOSEPH B. KLEIN, FRANCIS W. MADIGAN and WILLIAM A. NOLAN, Constituting the Board of Standards and Appeals of the City of New York,

Respondents-Appellants,

—and—

FREDERICK S. BAUM, ALAN BLOOM and ROSALYN BLOOM, his wife, WILLIAM J. FLEMING, JOHN J. KEATING and NANCY KEATING, his wife, DOLORES CARROLL and FLORENCE JENKINSON, GRACE HOLLIS, BRUCE L. HOWARD, TAKOOHI KAZIGIAN, DRAGUTIN HERZOG, EDITH ROSENBERGER and MAX BRUNSCHWIG,

Intervenors-Appellants.

Queens County Clerk's Index No. 3056/1972

Court of Appeals—Decision and Dissenting Opinion.

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of May in the year of our Lord one thousand nine hundred and seventy-three, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, Clerk.

JAMES M. FLAVIN, Acting Clerk

REMITTITUR May 3, 1973

BE IT REMEMBERED, That on the 29th day of January in the year of our Lord one thousand nine hundred and seventy-three Thomas F. Galvin et al. and Frederick S. Baum et al. the appellants in these causes, came here unto the Court of Appeals, by Norman Redlich and Corner, Finn, Cuomo & Charles, Gering, Gross & Gross, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Lefrak Forest Hills Corp. et al. and the Franklin National Bank the respondents in said causes, afterwards appeared in said Court of Appeals by Stroock & Stroock & Lavan and Murray Rudman, their attorneys.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard these causes argued by Mr. Jesse J. Fine, of counsel for the municipal appellants, and by Mr. Mario Matthew Cuomo, of counsel for the intervenors-appellants Baum & ors., and by Mr. Lawrence J. Gross, of counsel for the intervenors-appellants Herzog, & ors., and by Mr. John Van Voorhis, of counsel for the respondents Lefrak Forest Hills Corp. & ano., and by Mr. Murray Rudman, of counsel for the petitioner-respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs, on the opinion at the Appellate Division.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now re-

mains in the said Supreme Court, before the Justices thereof, &c.

JAMES M. FLAVIN
Acting Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, May 3, 1973.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said causes in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

JAMES M. FLAVIN,
Acting Clerk.

Opinion

STATE OF NEW YORK

COURT OF APPEALS

This opinion is uncorrected and subject to revision before publication in the New York Reports.

• • • • •

Order affirmed, without costs, on the opinion at the Appellate Division. All concur except Jasen, J., who dissents and votes to reverse in an opinion in which Burke and Gabrielli, JJ., concur.

Matter of Lefrak Forest Hills Corp.

v.

Galvin

JASEN, J. (dissenting):

I would reverse the order of the Appellate Division and reinstate the determination of the Board of Standards and Appeals. Viewing the record as a whole, I believe that the Board's determination is supported by substantial evidence and is not otherwise arbitrary or capricious. Further, I do not believe that Lefrak's privilege under the building permit matured into a vested right to complete construction of the projected high-rise apartment complex. Indeed, I question the applicability of the traditional vested rights doctrine to this case. Finally, assuming, as the majority at the Appellate Division seems to have done, that cases such as this may be resolved by balancing the equities (see, 2 Rathkopf, Law of Zoning and Planning, ch. 57, § 12, and 1971 Cum. Supp.; *Mtr. of Humble Oil & Refining Co.* v. *Worthington*, 49 Misc 2d 432; *Tremarco Corp.* v. *Garzio*, 32 N. J. 448; but see, *Mtr. of Smith* [*M. Spiegel & Sons*] [Sup. Ct., Kings Co.], N.Y.L.J., Jan. 5,

1968, p. 19, revd. 31 A D 2d 819), I take a different view of where the equities lie.

In December, 1960, the City of New York adopted a comprehensive amendment to its 1916 zoning resolution, prohibiting, among other things, construction of high-rise apartment developments in the Forest Hills-Kew Gardens area of Queens. The new resolution did not go into effect until a year later, on December 15, 1961. The purpose of the one-year delay or "grace period" was to avoid the disruption of building plans previously undertaken without knowledge of the projected comprehensive amendment. In other words, developers were permitted to file building plans for approval under the old zoning law until the latter date—December 15, 1961.

By virtue of an amendment adopted in 1963 (1960 Zoning Resolution, § 322)[1], a two-year extension of the building permit could be secured in the event that construction was begun but not completed by December 15, 1963, provided that substantial construction of foundations had been

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[1] That section provides in part:

"11-322

Extension of time to complete construction

The Board may extend or renew such building permit in accordance with the following provisions:

(a) For a minor development, the Board may authorize an extension of time limited to one term of not more than one year, to permit the completion of any building, provided that the Board finds that, as of December 15, 1963 substantial construction of foundations had been completed for such building (or each such building), or, in case of a major enlargement which does not require the installation of foundations, a substantial portion of such enlargement had been completed.

(b) For a major development, the Board may authorize an extension of time, limited to one term of not more than two years, to permit the continued construction of such development (including the start of new buildings) provided that the Board

(footnote continued on following page)

completed. By further amendment[2], (1960 Zoning Resolution, § 11-324), enacted in 1964, the Board was empowered to grant additional one-year extensions of building permits, "in appropriate cases" if "on or before the date of the expiration of the term of the preceding extension, substantial construction of foundations has been completed."

The property in question consists of two contiguous parcels, located immediately north and south of the Union Turnpike on the right-of-way of the Long Island Railroad, in the Forest Hills-Kew Gardens area of Queens. In March 1961, during the aforementioned grace period, the Long Island Railroad sold the property to Adson Industries, Inc. The contract authorized erection of buildings

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(footnote continued from preceding page)

finds that, as of December 15, 1963, for at least one building of the development substantial construction of foundations had been completed. Thereafter, the Board may authorize an additional extension, limited to one term of not more than one year, solely for the completion of those buildings for which the Board finds that, on or before the date of expiration of the extended building permit, substantial construction of foundation had been completed."

[2] That section reads in part:

"11-324

Further extensions

For minor or major developments for which extensions of time have been authorized in accordance with the provisions of Section 11-322 (Extension of period to complete construction) or Section 11-323 (Extension of development subject to delay), but which have not been completed within the term of the extension, the Board, upon application filed before the expiration date of the term of the preceding extension, may in appropriate cases grant additional extensions of time, each limited to one term not to exceed one year:

(a) For the completion of any building for which the Board finds that, on or before the date of expiration of the term of the preceding extension, substantial construction of foundations has been completed, or

(footnote continued on following page)

and related facilities at street level over the railroad bed, with the right to install columns and foundations in the railroad bed itself, the railroad reserving a perpetual easement for its purposes. In 1961, before expiration of the grace period, Adson filed its building plans and applied for construction permits for two 18-story apartment buildings conforming to the old zoning law. The plans were approved and the construction permits were issued in July, 1963. In the meantime, Adson had assigned its rights under the contract to two wholly-owned subsidiaries, Park Lane Plaza North, Inc., and Park Lane Plaza South, Inc.

In December, 1963, Adson's permit expired and it applied for an extension. In March of the following year, the Board granted a two-year extension, i.e., through December 1965, under the applicable provisions of the 1963 amendment (§ 11-322), finding that the project was a "major development" and that substantial construction of foundations of at least one of the buildings had occurred. In December 1965, Adson applied for a further extension,

(footnote continued from preceding page)

(b) For the completion of any building for which an extension of time was authorized under the provisions of Section 11-323, but for which substantial construction of foundations has not been completed within the term of the preceding extension, provided that the Board finds that:

(1) the criteria under which the preceding extension was permissible would excuse applicant's failure to complete such amount of construction, or

(2) applicant was prevented from completing such amount of construction by other hardship or inequity beyond his control, not including real estate market conditions or difficulties in obtaining the necessary financing.

For any such building which is not completed and for which such application for an additional extension of time is not filed before the expiration date of the term of the preceding extension, or is denied, the building permit shall lapse on such expiration date or on the date of such denial."

which was granted, pursuant to section 11-324(a). Another one-year extension was sought in December 1966, and was also granted. In 1967, Adson defaulted on an $800,000 mortgage on the subject property. Franklin National Bank, the mortgagee, purchased the property at a foreclosure sale and subsequently sought and obtained three successive one-year extensions of the building permits in 1967, 1968 and 1969.

In December 1970, Franklin sought a further extension until December 15, 1971, representing that it would make every effort to secure a builder to complete the construction in 1971. The Board granted the extension in January 1971. In April of that year, Franklin contracted to sell the property to Lefrak. The contract price was $200,000—$10,000 in cash and a $190,000 purchase money mortgage. Title passed in November 1971. Between contract and closing, Lefrak entered into possession and worked on site preparation. Lefrak also modified the original building plans in several respects, including foundations, to provide for two 20-story towers. In August 1971, the building permits were amended accordingly by the Queens Borough Superintendent.[3]

In December 1971, Lefrak applied for an additional one-year extension of the building permits. After two hearings, marked by high public interest, the Board denied the application finding (1) that Lefrak did not have a possessory interest in the property in question as of June 15, 1963, or during prior extensions; (2) that Lefrak had not established substantial construction of foundations prior to December 15, 1971, the cut-off date for consideration on an application for extension; and (3) that this was not an appropriate case for exercising its discretion to grant an extension.

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[3] The amended building plans did not, however, increase the degree of non-conformity with the 1960 Zoning Resolution.

Opinion.

The Appellate Division, by a divided court, annulled the determination and directed that Lefrak's applications be granted. The majority was of the view that the reciprocal actions of the Board in granting past extensions and of Lefrak and the predecessor owners of the property in making improvements and incurring obligations in reliance on the permits, gave rise to vested rights and equitable considerations which could not be abrogated.

Preliminarily, I would note agreement with the majority and the dissenters at the Appellate Division who rejected the Board's first asserted ground for denying an extension —that Lefrak lacks a possessory interest. Contrary to the Board's holding, nothing in the 1960 Zoning Resolution requires a possessory interest as of June 15, 1963. (See, 1960 Zoning Resolution, §§ 11-322, 11-323, 11-324.) Nor does it prohibit the assignment of building permits—a restraint which might run afoul of constitutional guarantees. (Cf., *Mtr. of Weinrib* v. *Weisler*, 33 A D 2d 923, affd. 27 N Y 2d 592.)

There is ample support in the record, however, for the Board's determination that substantial construction of foundations was not completed by Deecmber 15, 1971. As I read the statutory scheme, that date, the terminal date of the preceding extension, is the cut-off for determining whether the requirement of substantial construction of foundations has been met, and, thus, whether an additional extension may be granted. (§ 11-324[a].) Thus, all construction expenses, occurring after December 15, 1971, were at Lefrak's risk and need not have entered into the Board's deliberation on the application for an extension.

The proof submitted on the issue of substantial construction of foundations (up to December 15, 1971) was highly conflicting. Lefrak contended that approximately 837-863 cubic yards of concrete had been installed. Its concrete delivery tickets, however, showed substantially

less. And, as the Board noted, at best, 863 cubic yards of concrete represents only 13 percent of the concrete in the foundations. On the other hand, intervenors' expert found only about 4 percent of the foundations constructed as of December 15, 1971. On this record, I think the Board was amply justified in determining that the requisite *physical* evidence of a substantial commitment to build—i.e., substantial construction of foundations—was lacking.[4]

The Board also found that this was not an "*appropriate case* to exercise its discretion to grant an additional extension of time to permit the completion of construction." (Emphasis supplied.) The Board contends that "appropriateness" is an independent, additional statutory criterion for granting extensions under section 11-324 of the 1960 Zoning Resolution. On the other hand, Lefrak argues that "appropriateness" refers only to sub-paragraphs (a) and (b) of section 11-324—i.e., an appropriate case is one in which substantial construction of foundations has been completed (§ 11-324[a]) or one which involves a statutorily recognized hardship (§ 11-324[b]; see also, § 11-323).

I am inclined to agree that the appropriateness criterion affords the Board an additional measure of discretion in granting permit extensions.[5] I find it unnecessary, however, to characterize the appropriateness criterion under section 11-324, as I believe the Board's finding of no substantial construction of foundations is supported by sub-

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[4] It should also be noted that the intervenors cast doubt on the legitimacy of many of Lefrak's alleged costs and commitments with respect to this project.

[5] For example, in the instant case, under the appropriateness criterion the Board might consider the then eleven-year interval since adoption of the new Zoning Resolution; and the representation by Franklin National Bank on the previous application for an extension that the project would be substantially completed during 1971.

stantial evidence and is sufficient to uphold the denial of a permit extension.[6]

The question remains, nevertheless, whether prior extensions granted by the Board on similar or even less proof render the instant denial arbitrary and capricious. I think not.

In all, under section 11-324, the Board granted six permit extensions to Lefrak's predecessors, finding in each case that substantial construction of foundations had been completed. In each of the previous applications, substantially less construction costs and related expenditures were claimed. While continuous and uniform policy is to be desired, it must be remembered that the rule of *stare decisis* is not fully applicable in the administrative process and courts lack the power to impose consistency save where an error of law is involved. (*Mtr. of Dresher* [*Lubin*], 286 App. Div. 591, 594; 1 N. Y. Jur., Administrative Law, § 142; 2 Am. Jur. 2d, Administrative Law, §§ 470, 478; Anno., *Administrative Law—Stare Decisis,* 79 A L R 2d 1126; but see, *Mtr. of Fitzgerald* v. *State Div. Dept. of Pub. Service,* 262 App. Div. 393, 397.) Thus, an administrative agency is not bound to perpetuate past errors. On the contrary, it has the power and the duty to correct an erroneous interpretation of the governing statute or even an unwise policy. (*Mtr. of Punnett* v. *Evans,* 26 A D 2d 396, 398.) Similarly, a past deviation by an administrator should not bind future administrative action which represents a rational view of the applicable statutory provision. (*Mtr. of B'rith Abraham* v. *Thacher,* 43 Misc 2d 129, 130.)

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[6] I am satisfied, however, that if the Board's construction of the "appropriateness" criterion is correct, the standard, albeit general, is capable of a reasonble appliction within the context of the 1960 Zoning Resolution and is not an invalid delegation of legislative authority. (See generally, 1 N. Y. Jur., Administrative Law, §§ 44-54.)

Opinion.

Applying these guidelines to the instant case, I do not believe the Board's determination to be arbitrary or capricious. The prior extensions were granted after rather *pro forma* hearings and were premised on a finding of substantial constructions of foundations. It is now obvious that these determinations were erroneous and, in my view, the Board ought not be bound to follow them under any concept of *stare decisis*. Furthermore, Lefrak modified the building plans, including foundation design, and allegedly virtually abandoned whatever construction or site preparation work had been done in the past—all the more reason for allowing the Board to make a fresh appraisal of compliance with the statutory standard, unfettered by its past ill-considered and erroneous determinations. It should also be borne in mind that ten years had then elapsed since the effective date of the new Zoning Resolution and that on the previous application for an extension Franklin had represented that the building would be substantially completed during 1971. In view of this representation, the Board's refusal to mark that extension "terminal" is of no significance. Certainly, these factors must enter into any evaluation of the reasonableness of the Board's action in refusing this application for an extension—the seventh permit extension sought under section 11-324. Nor may the Board's prior determinations raise the bar of *res judicata*, for, among other reasons, in cases such as this one, the statutory scheme contemplates that an application for an extension will be determined on the basis of the construction of foundations completed during the term of the preceding extension. (§ 11-324.)

The case resolves itself then to a consideration of whether Lefrak acquired a vested right to complete construction. I think not.

The Appellate Division's holding to the contrary simply will not withstand a traditional vested rights analysis. The

right is one of private property and is secured by the constitutional guarantees against the deprivation of property without due process of law. (*City of Buffalo* v. *Chadeayne,* 134 N. Y. 163; *People ex rel. Manhattan Savings Institution* v. *Otis,* 90 N. Y. 48.) The vested rights theory involves really two rules (see, *Mtr. of Dubow* v. *Ross,* 254 App. Div. 706; *People ex rel. Ortenberg* v. *Bales,* 224 App. Div. 87, affd. 250 N. Y. 598; *Mtr. of Glenel Realty Corp.* v. *Worthington,* 4 A D 2d 702; *Mtr. of Smith* v. *Spiegel & Sons,* 31 A D 2d 819, affd. 24 N Y 2d 920; 6 N. Y. Jur., Buildings and Building Laws, §§ 12, 13), only one of which has any relevance here. Succinctly stated it is as follows: where a building permit has been validly issued, the privilege to build under the permit matures into a vested right to complete construction when, in reliance upon the permit, the property owner has, in good faith, commenced work of a substantial character on the property, made substantial expenditures, or incurred substantial obligations prior to an amendment to the zoning law which prohibits the intended use. (See, generally, 2 Rathkopf, Law of Zoning and Planning, ch. 57, § 3; Anderson, Zoning Law and Practice in New York, § 6.16, p. 127.)

The instant situation is clearly distinguishable. Here the original building permit for the property in question was not issued before adoption of the 1960 Zoning Resolution, nor was any construction begun before that date. Rather, the original building plans were filed during the one-year grace period following adoption of the Resolution and the original permit was issued some two years later, after the effective date thereof. We are dealing, then, essentially with a grace period provision and extensions thereof to which reasonable conditions may be attached. In these circumstances, a permittee may not acquire a vested right to an indefinite number of extensions, but

rather must meet the reasonable conditions attached to a grant thereof—in this case, substantial construction of foundations. This, petitioner has failed to do.

Implicit in the opinion for the majority at the Appellate Division is a recognition of the inapplicability of the traditional vested rights theory to this case. The Appellate Division has in effect fashioned a balancing of the equities test to determine whether Lefrak has acquired a vested right to complete construction. (Cf., 2 Rathkopf, *supra*, ch. 57, § 12, 1971 Cum. Supp.; *Humble Oil & Refining Co.* v. *Worthington*, 49 Misc 2d 432, *supra*; *Tremarco Corp.* v. *Garzio*, 32 N. J. 448, *supra*.) If such a test is to be indulged, I believe the equities are with the people of Queens who after more than eleven years and seven extensions of this building permit and unkept promises of completion are at last entitled to the benefits of the 1960 Zoning Resolution. I might add that this ambitious project to build twin high-rise apartment towers over the right of way of the Long Island Railroad appears to have been hastily conceived to take advantage of the grace period built into the Resolution, contrary to the spirit of the Resolution—witness the original acquisition of the property by Adson, Inc., midway through the grace period, and after Adson's default the inability to obtain a builder willing to undertake construction.

For the reasons stated, I would reverse the order of the Appellate Division and reinstate the determination of the Board of Standards and Appeals.

Appellate Division Order, Amending Original Order

Held in Kings County on May 25, 1973

HON. SAMUEL RABIN, *Presiding Justice*
HON. FRED J. MUNDER
Acting Presiding Justice

HON. M. HENRY MARTUSCELLO
HON. HENRY J. LATHAM
HON. MARCUS G. CHRIST
Associate Justices

IN THE MATTER OF
LEFRAK FOREST HILLS CORP. et al.,
Petitioners,

—v.—

THOMAS F. GALVIN et al., constituting the BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, et al.,
Respondents,

—and—

FREDERICK S. BAUM et al.,
Intervenors-Respondents.

IN THE MATTER OF
FRANKLIN NATIONAL BANK,
Petitioner,

—v.—

THOMAS F. GALVIN et al., constituting the BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, et al.,
Respondents,

—and—

FREDERICK S. BAUM et al.,
Intervenors-Respondents.

Appellate Division Order, Amending Original Order.

Order on motion

In the above entitled cause, this court by decision and order dated December 26, 1972, having annulled a determination of the Board of Standards and Appeals of the City of New York, made on February 10, 1972 and directed said Board to issue an extension of building permits for one year beginning December 26, 1972; and the petitioners in the first above-entitled proceeding having moved (a) for a declaration that the one year extension of the permits shall be issued forthwith for a term of one year from May 7, 1973 or (b) to amend said order of this court to direct that the respondent Board of Standards and Appeals shall issue the requisite permits to said petitioners for a term of one year from May 7, 1973;

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; the motion having been duly submitted and due deliberation having been had thereon; and upon the decision slip of the court herein, heretofore filed and made a part hereof; it is;

Ordered that the motion is hereby granted to the extent of amending the decision and order of this, dated December 26, 1972 to read as follows:

Ordered that the Board of Standards and Appeals is directed to issue the requisite permits to petitioners for a term of one year, commencing May 7, 1973.

Enter:

Irving N. Selkin
Clerk

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SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 15 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-322

FREDERICK S. BAUM, ET AL.,
Petitioners,

—against—

LEFRAK FOREST HILLS CORP., LEFRAK KEW GARDENS CORP., and FRANKLIN NATIONAL BANK,
Respondents.

MEMORANDUM OPPOSING CERTIORARI

CHARLES G. MOERDLER
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(212) 425-5200
Counsel for Respondents
Lefrak Forest Hills Corp.
and Lefrak Kew Gardens Corp.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-322

FREDERICK S. BAUM, et al.,

Petitioners,

—against—

LEFRAK FOREST HILLS CORP., LEFRAK KEW GARDENS CORP; and FRANKLIN NATIONAL BANK,

Respondents.

MEMORANDUM OPPOSING CERTIORARI

Respondents Lefrak Forest Hills Corp. and Lefrak Kew Gardens Corp. ("Lefrak") submit this memorandum in opposition to the petition for a writ of certiorari to review a judgment and opinion of the Court of Appeals of the State of New York, entered in this proceeding on May 3, 1973. Respondents Lefrak contend that the petition, filed on August 17, 1973 and more than 90 days since the entry of the aforesaid judgment, was not timely filed and, therefore, is jurisdictionally defective.

1. The above-entitled action arises from separate proceedings commenced by Respondents Lefrak and Franklin National Bank ("Franklin"), pursuant to Article 78 of the New York Civil Practice Law and Rules, to review and set aside resolutions of the Board of Standards and Appeals of

the City of New York ("The Board"), rendered on February 10, 1972, which denied applications by Lefrak and Franklin for a further extension of previously issued building permits so as to allow continued construction of two apartment buildings in the Forest Hills-Kew Gardens area of Queens County, New York.

By decision rendered December 26, 1972 and order entered thereon, the Appellate Division of the Supreme Court of the State of New York, Second Department, annulled the determination of the Board and directed the Board to issue an extension of the requested permits "for one year beginning from the date of entry of [the] order (December 26, 1972)." (A15)* The judgment of the Court of Appeals of the State of New York affirming the order of the Appellate Division was entered on May 3, 1973. (A34-A37)

The petition for writ of certiorari was filed on August 17, 1973, more than 90 days since the entry of judgment by the Court of Appeals, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U. S. C. Title 28, § 2101(c) and Rule 22 of this Court).

2. Petitioners contend that the period of 90 days within which a petition pursuant to 28 U. S. C. § 2101(c) shall be filed is to be computed not from May 3, 1973—the date of entry of the judgment of the Court of Appeals—but rather from May 25, 1973—the date of entry of an order of the Appellate Division which amended, in one minor and non-substantial respect, its prior order of December 26, 1972. Petitioners' contention is erroneous.

The May 25, 1973 order of the Appellate Division directed the Board to issue the requisite permits to Lefrak "for a term of one year from May 7, 1973", the date of filing of the remittitur of the Court of Appeals. (A49-A50) Thus, the Appellate Division's order of May 25, 1973 did no more than to grant Lefrak that which was originally

*References are to Petitioners' Appendix.

intended by its order of December 26, 1972—the issuance of building permits for a term of one year. In situations where a lower court judgment has been amended or modified, the test to be applied to determine whether the filing of a petition for a writ of certiorari is timely has been aptly stated by this Court in *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206 (1952):

> "The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." 344 U. S. at 212.

The rights of the various parties to the above entitled action were fully and finally adjudicated in the Court of Appeals judgment of May 3, 1973. The modification by the Appellate Division of May 25, 1973, which merely restored to Lefrak that portion of the one-year extension which was consumed by the appeal to the Court of Appeals, did not alter the substance of the Court of Appeals judgment, nor did it in any way affect the portions of that judgment which are now sought to be reviewed. Petitioners' own conduct underscores this conclusion since they neither appealed from nor in any way sought review of the order of May 25, 1973, and thus waived their right to do so.

Petitioners' failure to file their petition for a writ of certiorari within the prescribed time period is a jurisdictional defect which cannot be cured. *Department of Banking* v. *Pink*, 317 U. S. 264, 268 (1942). In any event, the petition does not warrant review by this Court, because, among other things, (a) it relates solely to New York practice; (b) it relies almost exclusively on the particular and peculiar facts of the given case which are unlikely to occur again; and (c) the judgment below is correct on the facts and on the merits.

CONCLUSION

For the above reasons, Petitioners' application for a writ of certiorari is untimely and without merit and should be denied.

Respectfully submitted,

CHARLES G. MOERDLER
61 Broadway
New York, New York 10006
(212) 425-5200
Counsel for Respondents
Lefrak Forest Hills Corp.
and Lefrak Kew Gardens Corp.

Dated: New York, New York
September 17, 1973

Supreme Court, U. S.
FILED
SEP 17 '73
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-322

FREDERICK S. BAUM, ET AL.,
Petitioners,

—against—

LEFRAK FOREST HILLS CORP., LEFRAK KEW GARDENS CORP., AND FRANKLIN NATIONAL BANK,
Respondents.

MEMORANDUM OPPOSING CERTIORARI

MURRAY RUDMAN
25 Broadway
New York, New York 10004
Attorney for Respondent
Franklin National Bank

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-322

FREDERICK S. BAUM, et al.,

Petitioners,

—against—

LEFRAK FOREST HILLS CORP., LEFRAK KEW GARDENS CORP., and FRANKLIN NATIONAL BANK,

Respondents.

MEMORANDUM OPPOSING CERTIORARI

Respondent, Franklin National Bank, represents to the Court as follows:

1. The above entitled matters arose out of separate proceedings instituted by respondents, Lefrak Forest Hills Corp. and Lefrak Kew Gardens Corp., ("Lefrak") pursuant to Article 78 of the New York Civil Practice Law and Rules and by Franklin National Bank ("Franklin") pursuant to Section 668e-1.0 Administrative Code of the City of New York, to review and set aside resolutions of the Board of Standards and Appeals of the City of New York ("The Board") adopted on February 10, 1972, by which the Board denied applications by Lefrak and Franklin for a further extension of previously issued building

permits so as to allow the continued construction of two multiple dwelling buildings in the Forest Hills-Kew Gardens area of Queens County, New York.

By decision rendered December 26, 1972 and order entered thereon, the Appellate Division of the Supreme Court of the State of New York, Second Department, annulled and set aside the resolutions of the Board and directed the Board to issue an extension of the building permits "for one year beginning from the date of entry of (the) order (December 26, 1972)." (A 15)*.

The petitioners herein appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, and the Court of Appeals of the State of New York by judgment entered May 3, 1973 affirmed the order of the Appellate Division on the opinion of the Appellate Division. (A34-A37)

2. The petition for writ of certiorari was filed on August 17, 1973, more than ninety days since the entry of judgment by the Court of Appeals, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U. S. C. Title 28, Sec. 2101 (c) and Rule 22 of this Court).

The petitioners contend that the period of ninety days within which to petition pursuant to 28 U. S. C. Sec. 2101 (c) was extended because Lefrak applied to the Appellate Division to amend its order of December 26, 1972 so as to require the Board to issue the one year extension of the building permits for one year from May 7, 1973 instead of for one year beginning December 26, 1972 and on May 25, 1973 the Appellate Division amended its order of December 26, 1972 by directing the Board to issue the building per-

*References are to Petitioners' Appendix.

mits "for a term of one year from May 7, 1973." The May 7, 1973 coincided with the date of filing of the remititur of the Court of Appeals (A49-A50). The order and judgment of the Court of Appeals was made the order and judgment of the Appellate Division of the Supreme Court on May 7, 1973. The motion to amend the order of the Appellate Division did not in any way affect the remititur of the Court of Appeals filed May 7, 1973. The motion to amend did not seek a reargument or a rehearing. The motion to amend the order of the Appellate Division was no more than a request that the Appellate Division reflect the passage of time from December 26, 1972 to May 7, 1973 so that the extension of the building permit would be for the one year period contemplated by that Court.

The petition for a writ of certiorari is addressed to the Judgment of the Court of Appeals. The running of the three-month period was not tolled by the application to the Appellate Division to amend its order so as to give effect to the expressed one year extension of the permits. On August 17, 1973 more than three months had elapsed since the finality of the judgment of the Court of Appeals as set by the filing of the remititur on May 7, 1973.

In *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206 (1952) this Court lay down the test to be applied to determine the timeliness of the filing of a petition for a writ of certiorari where a lower court judgment has been amended or modified. This Court Stated: (344 U. S. at 212)

> "The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality".

The amendment of May 25, 1973 by the Appellate Division did not disturb or revise legal rights and obligations which by the order of December 26, 1972 had been plainly and properly settled with finality. In fact, the amendment did no more than give effect to the prior direction for a one year extension of the permit.

Petitioners have failed to file their petition for a writ of certiorari within the prescribed time period. Accordingly the petition should be denied on the ground of untimeliness. *Department of Banking* v. *Pink*, 317 U. S. 264, 268 (1942). The failure to file the petition for a writ of certiorari within the ninety days as required by U. S. C. Title 28 Sec. 2101 (c) renders the petition jurisdictionally defective. *Department of Banking* v. *Pink, ibid.*

THEREFORE, it appears that petitioners' application for a writ of certiorari is out of time and should be denied.

Respectfully submitted,

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MURRAY RUDMAN
Attorney for Respondent
Franklin National Bank

Dated: September 10, 1973.